STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 4, 2000
v	No. 209542 Wayne Circuit Court
FELIPE D. GARCIA, Defendant-Appellant.	LC No. 96-003786

Before: White, P.J., and Sawyer and Griffin, JJ.

PER CURIAM.

Defendant Felipe D. Garcia appeals as of right his jury convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), arising out of a shooting death which occurred outside a corner store in Detroit. Defendant was sentenced to serve twenty-five to fifty years' imprisonment on his murder conviction, preceded by the mandatory two-year term for the felony-firearm conviction. We affirm.

I

On appeal, defendant first argues that the trial court abused its discretion in denying defendant's motion for a mistrial following a brief reference by a prosecution witness indicating defendant was involved in a gang. We disagree.

This Court reviews a trial court decision regarding a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *Id*. at 228. Because the record below reveals that defendant's right to a fair trial was not diminished by this reference, we do not believe that the trial court abused its discretion in failing to grant a mistrial.

Defendant's claimed error occurred during the testimony of a thirteen-year-old eyewitness to the shooting, as he was being questioned by the prosecutor. This witness testified that on the day of the murder, he saw two individuals shooting at the truck in which the deceased had been sitting and

identified defendant as one of those two individuals. The prosecutor then attempted to establish a basis for the witness' recognition of defendant, during which the following colloquy occurred:

Q. Okay. How do you know [defendant] or the person you refer to as Floppy?

A. From being in the gang and –

Q. Are you in a gang?

A. No, I'm not.

In the present case, assuming the witness' actions constituted an irregularity in the proceedings, defendant has failed to demonstrate prejudice. As recently noted by this Court in *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), "not every instance of mention before a jury of some inappropriate subject matter warrants a mistrial." In general, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *Haywood*, *supra* at 228. In this case, the remark by the witness was not elicited by the prosecutor's questioning. Instead, the comment was a volunteered and unresponsive answer to a proper question. *Id*.

Moreover, where there has been no prejudice, the defendant is not entitled to a mistrial. *People v Flinnon*, 78 Mich App 380, 391; 260 NW2d 106 (1977). In this case, defendant was not prejudiced by this fleeting and unsolicited reference. See *Haywood*, *supra* at 228. Despite defendant's claim that the trial court erred in failing to give the jurors a cautionary instruction, the record clearly indicates that such instruction was in fact given, both immediately upon the jury's return to the courtroom and then again during final instructions. The trial court's curative instructions to the jury were sufficient to cure any prejudice to defendant. See *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995). Accordingly, we do not believe that defendant was denied a fair trial on the asserted grounds.

II

Next, defendant argues that the trial court committed error requiring reversal in limiting the impeachment of a prosecution witness with evidence of a prior conviction. Again, we disagree.

A trial court's decision regarding the admissibility of impeachment by evidence of a prior conviction is within its sound discretion and will not be reversed on appeal absent abuse of that discretion. MRE 609(a)(2); *People v Coleman*, 210 Mich App 1; 532 NW2d 885 (1995). Trial courts have the discretion to impose reasonable limits on cross-examination on the basis of concerns about harassment, prejudice, confusion of the issues, or interrogation that is repetitive or only marginally relevant. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993).

At trial, prosecution witness Steven Bart testified on direct-examination that on the day of the murder he saw defendant and another individual running from the area of the store just after hearing gunshots being fired. On cross-examination, defense counsel sought to impeach prosecution witness Steven Bart with evidence of prior convictions of armed robbery and larceny from a person. In doing

so, counsel first asked Bart whether he had, within the last ten years, "been convicted of a felony involving theft, dishonesty, or false statement." Upon Bart's affirmative response, counsel for defendant inquired as to the specific felony of which Bart had been convicted; however, the trial judge refused to allow Bart to answer, stating that in light of the purpose of the rule allowing for impeachment by prior conviction, the affirmative response to the question posed was sufficient to impeach the witness' credibility. On that basis, the court ruled that any further questioning regarding the specifics of that conviction would not be probative of veracity, but would serve only to "paint [Bart] as a bad fellow," and refused to allow any further questioning regarding the witness' prior convictions.

On appeal, defendant contends that the court's limitation on questioning regarding Bart's prior convictions was an abuse of discretion which denied him his right to confront and cross-examine his accusers. Defendant cites *People v VanDorsten*, 409 Mich 942; 298 NW2d 421 (1980), and *People v McBride*, 413 Mich 341; 319 NW2d 535 (1982), for the proposition that it is improper to inform a jury of the existence of a prior felony conviction without also providing the names of the offense. However, defendant's reliance on *VanDorsten* and *McBride* is misplaced.

In each of those cases, the impeachment was attempted merely by putting before the jury the fact that the witness had been previously convicted of "a felony." In both *VanDorsten* and *McBride*, the Court found the proffered impeachment attempts invalid because the method used did not disclose the "nature" of the conviction; a defect not present in the case at bar. As explained by the Court in *McBride, supra* at 345:

> Because many felonious activities have little if any relationship to veracity, a prior felony conviction is not in itself a reliable indication of lack of credibility. Without knowledge of the nature of the felony, the trier of fact has no probative evidence to consider . . . [Quoting *People v Garth*, 93 Mich App 308, 317-318; 287 NW2d 216 (1979).]

In the instant case, the rationale behind prohibiting impeachment by evidence of an unspecified felony conviction has not been offended. The Supreme Court made it clear in both *VanDorsten* and *McBride* that it is the nature of the prior felony conviction and not the fact of conviction which is important to the jury's evaluation of credibility. This is not a case wherein the jury was invited to speculate on the nature of the felony. Here, defendant solicited a response from the witness indicating that he had in fact been convicted of a felony involving theft, dishonesty, or false statement. See MRE 609(a). Further, because the material issue was credibility, error, if any, in the court's limiting cross-examination regarding the specifics of the felonies was harmless in light of the fact that the jury was informed that theft, dishonesty or false statement was involved. *People v Lukity*, 460 Mich 484; 596 NW2d 60 (1999).

Defendant also argues that the trial court erred in refusing to allow defense counsel to question Bart about an alleged arrangement with the police pertaining to charges purportedly pending against Bart at the time of trial. Defendant contends that such information was important to his defense because it indicates Bart had some motivation to lie.

While we agree that charges pending against a prosecution witness are relevant to the witness' interest in testifying and may be admitted for that purpose, *People v Hall*, 174 Mich App 686, 436 NW2d 446 (1989), because the witness denied being on probation at the time and defendant made no offer of proof in the trial court, this Court cannot verify the allegations of pending charges and outstanding warrants made by defense counsel at trial. A party whose proffered evidence is excluded at trial must make an offer of proof to preserve the issue of admissibility of the evidence for appeal. MRE 103(a)(2); *People v Stacy*, 193 Mich App 19, 31; 484 NW2d 675 (1992) (failure to make offer of proof precludes review of evidentiary issue absent manifest injustice). In this case, counsel for defendant indicated that he possessed a "computer print-out" proving the existence of outstanding warrants against Bart but failed to make an offer of proof of that document when the trial court refused to admit it. Additionally, counsel indicated that he would obtain the court file and recall Bart in order to establish the existence of pending probation violations but failed to ever do so. Therefore, defendant has failed to establish that the suppression worked any injustice upon him. *Id.*

III

Next, defendant argues that the trial court erred in failing to give an instruction regarding voluntary manslaughter and reckless discharge of a firearm resulting in death. A trial court is required to instruct the jury concerning the law applicable to the case and to fully and fairly present the case to the jury in an understandable manner. MCL 768.29; MSA 28.1052; *People v Daoust*, 228 Mich App 1, 14; 577 NW2d 179 (1998). Thus, a judge must instruct on lesser included offenses when so requested and if supported by the evidence. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991).

There are two types of lesser included felony offenses: necessarily included offenses and cognate lesser offenses. *People v Hendricks*, 446 Mich 435, 452; 521 NW2d 546 (1994). A cognate lesser offense shares several elements and is in the same class of offenses as the greater crime but differs from the greater crime in that it contains some elements not found in the higher offense. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999). If the evidence presented would support a conviction of a cognate lesser offense, the trial court, if requested, must instruct on it. *People v VanWyck*, 402 Mich 266, 270; 262 NW2d 638 (1978).

Voluntary manslaughter is a cognate lesser offense of murder. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). Therefore, this Court must review the record adduced at trial to determine whether the evidence was sufficient to convict the defendant of a cognate lesser included offense. *People v Cheeks*, 216 Mich App 470, 479-480; 549 NW2d 584 (1996).

The elements of voluntary manslaughter are: (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions. *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995). It is the element of provocation that distinguishes the offense of manslaughter from murder. *Pouncey*, *supra* at 388.

The trial court instructed the jury as to first- and second-degree murder but refused to instruct regarding voluntary manslaughter, concluding that no reasonable jury could find that the provocation

was adequate to cause a reasonable person to act out of passion. We agree with the trial court's conclusion in this regard.

"Key to any finding of voluntary manslaughter is evidence of adequate provocation that a reasonable factfinder could conclude that the defendant, overcome by emotion, could not choose to refrain from the crime." *Pouncey*, *supra* at 392. In this case, the only evidence of provocation consisted of testimony regarding a short exchange of words between the victim's companion and defendant outside the store. While it cannot be said that insulting words are never adequate provocation, we conclude that under the present circumstances a reasonable trier of fact could not find that such words were "so severe or extreme as to provoke a reasonable man" to react as defendant did. *Id*. at 391-392; see also *Sullivan*, *supra* at 519. Joseph Hopkins, who was with defendant at the time of the shooting, testified that he told police that the victim's companion had reached into his shirt "as if he had a gun or something." However, there was nothing in the record to indicate that defendant also saw this alleged gesture, so as to provoke him to fire upon the victim and his companion. Thus, we are not persuaded that the trial judge abused his discretion in refusing the requested instruction on voluntary manslaughter.

Moreover, we are not persuaded that the evidence required instruction on the offense of reckless discharge of a firearm as there is nothing in the record to support a finding of guilt on that charge. The offense of careless, reckless, or negligent use of a firearm is proscribed by statute:

> Any person who, because of carelessness, recklessness or negligence, *but not wilfully or wantonly*, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison for not more than 2 years, or by a fine of not more than $2,000.00, or by imprisonment in the county jail for not more than 1 year, in the discretion of the court. [MCL 752.861; MSA 28.436(21) (emphasis added).]

In *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982), the Supreme Court held that, when properly requested, a trial court should instruct a jury on appropriate lesser included misdemeanors if a rational view of the evidence could support a verdict of guilty of the misdemeanor and not guilty of the felony, the defendant has proper notice or has made the request, and the instruction would not result in confusion or injustice. Failure to give such an instruction is an abuse of discretion if a reasonable person would find no justification or excuse for the ruling made. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

In this case, the trial court instructed the jury on second-degree murder, but denied defendant's request to instruct on careless, reckless, or negligent use of a firearm. See MCL 752.861; MSA 28.426(21) and CJI2d 11.20. Having reviewed the record, we believe that a rational trier of fact could not conclude that there was evidence to support the misdemeanor instruction. At trial, there was absolutely no evidence presented to support a finding that the victim's death was the result of "carelessness, recklessness, or negligence." To the contrary, the testimony of the only witnesses to the shooting indicates that the shooting was done "wilfully or wantonly," a characteristic removing

defendant's conduct from the purview of the statute.

IV

Defendant next argues that he was denied a fair trial by improper remarks by the prosecutor during closing argument. This argument is wholly without merit. This Court reviews questions of prosecutorial misconduct case by case, considering contested remarks in context and evaluating them in light of defense arguments and their relationship to the evidence presented at trial. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Initially, we note that the prosecutor was not, as argued by defendant, testifying to facts not in evidence but was merely restating the testimony offered at trial. The disputed comment accurately restated what occurred during testimony, without introducing any new facts into evidence.[1] While a prosecutor may not argue the effect of testimony that was not entered into evidence at trial, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), he is free to argue the evidence and all reasonable inferences therefrom, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). There was nothing improper in the comment complained of here.

Furthermore, in making the comment complained of on appeal, the prosecutor was merely responding to the argument made by defense counsel during his closing statement. Thus, the remark does not rise to the level of an error requiring reversal. See *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). Any unfair prejudice produced by the challenged comment was cured by the trial court's explicit and repeated instructions to the jury that it was required to decide the case on its recollection of the evidence and that the lawyers' statements were not evidence. See *People v Mack*, 190 Mich App 7, 19; 475 NW2d 830 (1991).

Defendant also argues that he was denied a fair trial by the prosecutor's alleged mischaracterization of testimony during closing argument. We have reviewed the prosecutor's comments in conjunction with the disputed testimony and find that the prosecutor did not misstate such testimony. Thus, no basis exists for this allegation of prosecutorial misconduct.

V

Next, defendant attacks the validity of his sentence, arguing that the sentence is disproportionate and that the trial judge erroneously scored the sentencing guidelines.

This Court reviews a defendant's sentence for an abuse of discretion. *People v Cervantes*, 448 Mich 620, 626; 532 NW2d 831 (1995). A sentence constitutes an abuse of discretion if it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The principle of proportionality embodies the precept that sentences imposed by a trial court must be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.*

Initially, we note that because defendant failed to provide this Court with a copy of his

presentence investigation report, as required under MCR 7.212(C)(6), he has waived this issue on appeal. *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995). However, even considered on its merits, defendant's sentence reflects no error requiring resentencing.

Defendant claims that his sentence is outside the guidelines range of 60 to 180 months. However, although the guidelines were originally scored within this range, the trial court recalculated the guidelines at sentencing after the prosecutor argued that offense variable three – Intent to Kill and Injure – had been wrongfully scored. Defendant's sentence is within the guidelines' recommended range and is thus presumed to be proportionate. *Kennebrew, supra* at 609.

Defendant now argues that the trial court erred in its recalculation of offense variable three. However, the Michigan Supreme Court has recently determined that "[t]here is no juridical basis for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guideline variables." *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997). Consequently, "[a]ppellate courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied." *Id*. at 178. The *Mitchell* Court did, however, recognize a limited exception to this rule where the challenge is directed to the factual basis of the sentence:

> [A]pplication of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. [*Id*. at 177.]

Defendant argues that his claim on appeal falls within this exception, as it is based on a factual predicate that is materially false. We disagree. In essence, defendant's challenge is directed not to the accuracy of the factual basis for the sentence but rather to the judge's calculation of the sentencing variable on the basis of his discretionary interpretation of the facts. *Id*. at 176-177. Moreover, because defendant has failed to provide this Court with a presentence report upon which to review the proportionality of his sentence, we cannot appropriately review the proportionality of defendant's sentence. Defendant has failed to state a cognizable claim and this Court is precluded by *Mitchell* from reviewing the argument on appeal.

Finally, defendant, relying on *People v Fortson*, 202 Mich App 13; 507 NW2d 763 (1993), argues that because the trial court expressed its independent belief that defendant was actually guilty of first-degree murder, he is entitled to resentencing. Again, we do not agree.

In *Fortson*, this Court, citing *People v Glover*, 154 Mich App 22; 397 NW2d 199 (1986), held that the defendant was entitled to resentencing where the trial court utilized an independent finding that the defendant was guilty of first-degree premeditated murder as a reason for justifying a sentence of ten to fifteen years on a conviction of voluntary manslaughter.

In *Glover*, *supra* at 45, this Court held that "[a] trial judge is not entitled to make an independent finding of a defendant's guilt on another charge and assert that as a basis justifying sentence, especially where a defendant was found not guilty of that charge." In that case, the trial court departed

upward from the recommended guidelines range in sentencing the defendant on his conviction of voluntary manslaughter, stating as one of the reasons for the departure that the crime was "too cold and deliberate." *Id*. at 44. On appeal, this Court held that "[b]ecause defendant was found not guilty of first-degree murder, there was no justification for imposing a sentence based upon the trial judge's opinion that the defendant should have been convicted of the greater offense." *Id*. at 45.

In the instant case, while it is true that the trial judge stated his belief that defendant was guilty of the greater offense of first-degree murder, the judge also clearly stated that he was sentencing defendant on the basis of his jury conviction of second-degree murder. Thus, the judge in the instant case neither used his belief of greater culpability as justification for the sentence, *Fortson, supra*, nor used that belief to justify a guidelines departure, *Glover, supra*. The sentence imposed here was within the guidelines' recommended range of 120 to 300 months' incarceration. Therefore, resentencing is not required.

Affirmed.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Richard Allen Griffin

[1] There may be some confusion stemming from the fact that the prosecutor showed the witness one photograph, of Eduardo Garcia, while the witness was testifying, but had earlier shown him, in the hallway several days before, a number of photographs, including one of defendant. The prosecutor's statement was an accurate account of the trial testimony, although it begged the issue of what happened in the hallway. Although one can read into the prosecutor's statement an assertion that defendant's picture was not shown to the witness in the hallway, we will not assume that the prosecutor intended that the jury make this inference when the statement was an accurate account of the questioning and testimony.